Supreme Court, U. S.
FILED
SEP 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

Nos. 74-1302 and 74-1316

JOHN T. DUNLOP, Secretary of Labor, and CASPAR W. WEINBERGER, Secretary of Health, Education, and Welfare,

Appellants,

v.

TURNER ELKHORN MINING COMPANY, *et al.*,

Appellees.

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v.

JOHN T. DUNLOP, Secretary of Labor, and CASPAR W. WEINBERGER, Secretary of Health, Education, and Welfare,

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On Appeals from the United States District Court for the Eastern District of Kentucky

BRIEF AMICUS CURIAE FOR THE UNITED MINE WORKERS OF AMERICA

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The United Mine Workers of America presents this brief in support of the government with the consent of counsel for all parties.

INTEREST OF AMICUS

The United Mine Workers of America is an international labor organization which represents more than 122,000 active and 90,000 retired coal miners within the United

States. Nearly 80 per cent of the working coal miners in the United States are members of the UMWA. The leadership and members of the UMWA were instrumental in securing passage of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 744, as amended by the Black Lung Benefits Act of 1972, Pub. L. 93-303, 86 Stat. 150, 30 U.S.C. (Supp. II) § 901 *et seq.* In addition, the UMWA has been involved for many years in efforts to improve workers' compensation programs in the coalfield states and in securing compensation benefits for its members. See *United Mine Workers* v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967).

The constitution of the UMWA International Union provides for a special compensation fund in each district supported by a uniform contribution paid out of the dues of all members.[1] In accordance with this constitutional provision, the UMWA employs or retains attorneys who represent thousands of members and their survivors on federal black lung claims and on state workers' compensation claims.

Ninety-seven per cent of all awards involving coal operator liability under Title IV of the Federal Coal Mine Health and Safety Act, as amended, have been contested by the particular operator who has been assigned liability.[2] Resolution of most of these contested claims is dependent upon the outcome of this case. Consequently, hanging in the balance as the operators' administrative appeals are pending is the

[1] Article XIII, Section 4, reads in part:

> "Such compensation trust fund money shall be expended in all Districts uniformly only for expenses incurred assisting members in obtaining unemployment and workmen's compensation benefits, including black lung payments and, where possible, in assisting widows and dependents of former members."

[2] Brief of Bituminous Coal Operators' Association, Inc., Amicus Curiae, at 6.

future economic security of hundreds of UMWA members and their families.[3]

The issues in this case go to the core of the scheme established by Congress to assure that benefits will be paid nationwide to coal miners who suffer from disabling lung disease caused by their occupation. The operators' appeal[4] raises questions about the Act's definition of total disability, the burden of proof in establishing occupationally related disability, and the scope of the coal industry's liability for compensating past victims of coal workers' pneumoconiosis. The government's appeal[5] seeks to establish the constitutionality of two sections of the Act that define the kind of evidence necessary to prove disability from pneumoconiosis. Unless this Court resolves these issues favorably to the Act's constitutionality, thousands of miners who are now disabled and thousands more who are still working will be unable to qualify for the compensation Congress intended to guarantee them. Thousands more will be required to undergo additional costly and arduous medical testing and protracted litigation in order to establish their claims.

The government will concentrate on defending the action of Congress and its own interests as administrator of the program Congress has established. The UMWA approaches the case as the representative of many of the miners, widows, and orphans who would be denied black lung benefits or who would encounter greater delay, expense, and discomfort in establishing their claims if this Court should fail to uphold the constitutionality of all sections of Title IV of the Act.

[3] Because of the slow and low rate of awards by the Department of Labor, this number now stands in the hundreds, but can be expected to rise to the thousands before this case is finally decided.

[4] *Turner Elkhorn Mining Co., et al.* v. *Dunlop*, No. 74-1316.

[5] *Dunlop* v. *Turner Elkhorn Mining Co., et al.*, No. 74-1302.

In addition, the UMWA recognizes that a decision by this Court holding any aspect of the federal black lung program unconstitutional could have a far-reaching and disruptive impact on state workers' compensation programs throughout the country. If the district court's decision on the constitutionality of § 411(c)(3) of the Act, 30 U.S.C. (Supp. II) § 921(c)(3), should be upheld, schedule benefits, dependency rules, and numerous other provisions of state workers' compensation laws would be called into question because they, in turn, could be analyzed as irrebuttable presumptions depriving employers of due process of law. If the operators should be successful in their challenge to other sections of the Act relating to the definition of disability and burden of proof, virtually no state workers' compensation award would be immune from constitutional attack. Furthermore, any decision striking down operator liability to compensate past victims of pneumoconiosis would interfere with the efforts of state legislature to provide compensation to the victims of all slow-to-be-revealed occupational diseases.

Underground coal mining causes a higher rate of occupationally related injury than any other major industry in this country.[6] As a result, coal miners and their union are grimly and inevitably concerned with the eligibility rules and procedures of state and federal compensation programs. The UMWA submits this brief amicus curiae in order to assure that the industrial context of this case as well as its broader ramifications for the present and future of the federal black lung program are fully presented to the Court.

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[6] National Safety Council, *Accident Facts* 26 (1974). Underground coal miners suffer 35.44 disabling injuries per million worker hours as compared with 10.55 disabling injuries per million worker hours for industrial workers generally.

SUMMARY OF ARGUMENT

The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, *et seq.*, established a rational scheme, consistent with the requirements of due process, for providing compensation to miners disabled by pneumoconiosis in the past. The liability of coal operators for a small number of claims of former employees who left the mines before the Act was passed does not place any substantial or irrational economic burden upon them. Furthermore, the operators themselves are primarily responsible for the failure of eligible miners to apply for black lung benefits payable from public funds, since the operators alone knew the identity of their former employees and could and should have notified them of the federal program.

The three rebuttable presumptions contained in § 411(c) of the Act, 30 U.S.C. (Supp. II) § 921(c), represent a fair and rational legislative response to the inadequacy of past medical records and the limitations of all known medical techniques for the positive diagnosis of pneumoconiosis. These presumptions help to prevent the miner or his survivors from being prejudiced in his claim by the very failures of the coal mining industry and medical science that the Act is now attempting to remedy.

Section 411(c)(3) of the Act, which compensates all miners who suffer from complicated pneumoconiosis, represents a reasonable legislative response to medical testimony that complicated pneumoconiosis is a devastating, progressive disease that is ordinarily disabling and that significantly shortens a miner's life expectancy. Section 411(c)(3) thus forms an integral part of the overall congressional scheme of providing benefits to miners who are totally disabled by pneumoconiosis. Judged by the criteria set forth in *Salfi* v. *Weinberger*, —— U.S. ——, 43 U.S.L.W. 4985 (1975), this section is plainly consistent with the coal operators' right to due process of law.

I. THE OPERATORS' LIABILITY TO PAY BENEFITS TO CERTAIN CATEGORIES OF MINERS WHO STOPPED WORKING IN THE MINES BEFORE PASSAGE OF THE ACT IS A RATIONAL ASPECT OF A RATIONAL CONGRESSIONAL SCHEME.

The operators argue that the Federal Coal Mine Health and Safety Act, as amended, deprives them of due process of law because it arbitrarily and irrationally requires coal operators to pay benefits to former employees who left coal mine employment prior to passage of the Act.

In evaluating the rationality of the scheme Congress adopted for providing benefits to miners disabled in the past, it is essential to keep in mind the complexity of the problem Congress set out to solve. Congress was undertaking to provide benefits to the victims of a disease that had existed for years, had caused devastating illness and widespread suffering, but had only recently been identified in this country as a disease caused by the coal miner's occupation. In deciding to compensate the innocent victims of this disease, Congress was faced with the difficulty of reconciling the just claims of the suffering miner or his survivors with the obligations and rights of the energy-consuming public and the obligations and rights of the coal producers in a program that would be administratively workable. If some neat and simple solution existed, the many fine thinkers who turned their attention to the matter would have found it. Congress deliberated at length before passage of the Act and gave further attention to ways of devising an equitable system for providing black lung benefits in additional hearings following passage of the original Act in 1969.

Whether Congress had the *power* to tackle this difficult problem is not a question presented by this case.[7] Nor do

[7] *National Independent Coal Operator's Assn.* v. *Brennan*, 372 F. Supp. 16 (D.D.C. 1974), *aff'd*, 419 U.S. 955 (1974). See also Consolidated Brief for Turner Elkhorn Mining Co., *et al.*, at 30 (hereinafter "Turner Elkhorn Brief").

the operators complain of their liability for the claims of miners who worked for long years before December 30, 1969, but had some period of coal mine employment after that date.[8] The only issue here is whether the program adopted by Congress for allocating financial responsibility for miners who left coal mining before December 30, 1969, and who filed claims after June 30, 1973, is so irrational and arbitrary as to deprive the operators of due process of law.

A. The operators bear primary responsibility for the failure of their former employees to file for benefits payable from the public treasury.

Congress established a rational and workable scheme that explicitly recognized and provided for the compensation of miners and survivors of miners who had left coal mine employment before passage of the Act. As the operators acknowledge, Congress took great pains to create a program that would *not* place upon the industry the primary burden for compensating miners disabled in the past.[9] Congress specified a three-and-one-half year period (December 30, 1969, through June 30, 1973) for the filing of claims that would be the full and permanent responsibility of the American public payable from the U.S. Treasury. More than 550,000 miners and miners' survivors applied for benefits during that period[10] and more than 336,000 of those claims have been awarded so far.[11] If the coal operators are now complaining about their liability to miners who re-

[8] Turner Elkhorn Brief 33.

[9] Appellant's Jurisdictional Statement, No. 74-1316, at 15-16 n.7. See also Turner Elkhorn Brief 40.

[10] Statement of James B. Cardwell before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess. (March 6, 1975).

[11] E. Clague, *Determining eligibility for black-lung compensation*, 97 Monthly Labor Rev. 25, 29 (March 1974).

tired before December 30, 1969, but did not apply for benefits until after June 30, 1973, they have no one to blame but themselves.

The operators were in sole possession of the information necessary to notify their former employees of the opportunity to apply for benefits under the federally-funded black lung program. In recent Congressional hearings, Bernard Popick, then director of the Social Security Administration's Bureau of Disability Insurance, testified that "the Social Security Administration undertook a very comprehensive and large-scale effort" to notify former miners and miners' survivors throughout the country of the availability of black lung benefits.[12] Mr. Popick explained that Social Security had been unable to give individual notice of the existence of the black lung program to every former coal miner or miner's survivor "because we have no way to identify on our own the people who would meet the requirements of the law or who would ever meet the requirement of coal mining employment, as specified under law."[13] The only complete record of those names, he explained, would be with the coal operators. A number of operators evidently recognized this and asked Social Security "to identify from a list of their former employees those who had filed claims with us."[14] According to Mr. Popick, these operators then undertook to advise all their former employees to file claims before the July 1, 1973, deadline:

> "They then took the list of names of people they understood not to have filed claims and got in touch with them or told them to get in touch with us to file a claim."[15]

[12] Hearings before the General Subcommittee on Labor, House Committee on Education and Labor, on H.R. 3476, 93d Cong., 2d Sess., 371.

[13] *Id.* at 372.

[14] *Id.* at 371.

[15] *Id.* at 372.

There is no evidence that any of the plaintiffs in this action ever made such an effort.

A miner or miner's survivor had every reason to file a claim before jurisdiction passed from the Social Security Administration to the Department of Labor. Claims filed before July 1, 1973, were judged under the more liberal "interim standards" contained in 20 C.F.R. § 410.490 rather than the stricter permanent medical criteria of 20 C.F.R. § 410.412 ff., used to evaluate claims filed after June 30, 1973.[16] Claims filed after that date are subjected to an adversary adjudication process in which the potentially liable coal operator is entitled to contest any award, whereas claims filed before that date are decided under Social Security's non-adversary administrative procedures.[17] Miners who established claims under Social Security's black lung program are entitled to lifetime benefits (assuming their continuing eligibility) and are deemed to have filed a protective application to assure payments for their surviving dependents after their death; in contrast, claims filed after June 30, 1973, may be payable only through December 31, 1981.[18] Disabled miners who filed claims before July 1, 1973, can draw full federal black lung benefits together with full Social Security disability benefits, whereas miners who filed claims after that date were subject, after Decem-

[16] Compare the 21.6 per cent approval rate under the Department of Labor program with Social Security's more than 60 per cent approval rate. Clague, *supra*, n. 11, at 27; U.S. Dept. of Labor, Black Lung Benefits Act of 1972: First Annual Report on Administration of the Act during the Calendar Year 1974 and the Transitional Period in the Second Half of 1973, at 1 (May 1975).

[17] Compare § 413(b) of the Act with §§ 415(a)(4) and 422.

[18] The uncertainty about the interpretation of § 422(e) is explained in Turner Elkhorn's Brief 19 n.16.

ber 31, 1973, to having their disability benefits reduced on account of receipt of black lung benefits.[19]

For all these reasons, it is highly unlikely that a former miner who was aware of the federal black lung program would have had any interest in postponing his application until after June 30, 1973.[20] Accordingly, miners who left coal mine employment before December 30, 1969, but who applied for benefits after June 30, 1973, must fall into one of three categories: (1) miners who qualified for benefits from Social Security and are attempting to establish simultaneous entitlement under the Department of Labor program; (2) miners whose claims were denied by Social Security and who are attempting to establish eligibility under the Department of Labor program instead; and (3) miners who were not adequately informed of their right to apply for benefits until after June 30, 1973. No miner in any of these categories can receive approval unless he shows that

[19] Section 412(b) of the Act provides that benefits paid for claims filed before July 1, 1973, shall not be considered workmen's compensation benefits for the purposes of the offset provisions of § 224 of the Social Security Act, 42 U.S.C. § 424. There is no corresponding protection for benefits paid after December 31, 1973, to miners who applied after July 1, 1973.

[20] For certain very limited classes of claimants there are advantages to the Part C program. For employed persons there is no earnings offset corresponding to the earnings offset for Part B claimants contained in § 412(b). Workmen's compensation benefits for injuries unrelated to pneumoconiosis are not subtracted from Part C claims, as they are from Part B claims. Compare § 412(b) with § 422(g). Medical treatment benefits are provided to Part C beneficiaries but not to Part B beneficiaries. § 422(g). However, these advantages are maximized by establishing simultaneous entitlement under both Parts B and C. Absolutely no advantage could be gained by failure to file a Part B claim.

he applied within three years of the date he discovered he was totally disabled by pneumoconiosis.[21]

The number of miners in the first category is some fraction of the approximately 3,000 claims filed by miners who qualified for benefits under the Social Security program.[22] A very substantial number of those claims have been or will be denied as a result of the more rigorous medical and adjudicatory standards of the Department of Labor program.[23] Miners who retired before December 30, 1969, will be a disproportionately large segment of the denials since they are not accorded the § 411(c)(4) presumption that respiratory disability is caused by pneumoconiosis if the miner has more than 15 years' coal mine employment.[24] Thus, at most, there will be several hundred miners in this category in the entire industry, of whom few, if any, will be former employees of plaintiffs. Furthermore, the opera-

[21] Section 422(f)(1). As the government describes, the Act was intended to provide enough flexibility in its statute of limitations to allow for the claims of miners in whom the disease became disabling only several years after they left coal mine employment. Hence, theoretically, there could be a category of miners who retired before December 30, 1969, but who had no idea they were disabled until after June 30, 1973. As a practical matter, however, these miners fall within category (3), for they did not have sufficient notice of their rights. That is because any retired miner who suspected his exposure to coal dust might have caused pneumoconiosis had every reason to apply before July 1, 1973, since at that time a miner could qualify for benefits solely on the basis of X-ray proof of pneumoconiosis at any stage. 20 C.F.R. § 410.490.

[22] As of August 1975, according to information supplied to the UMWA by the Department of Labor, 2,891 refilings had been received. Because of the statute of limitations in § 422(f)(1), only a limited number of possibly valid additional claims can be expected.

[23] See n.16, *supra*.

[24] Section 422(f)(2) provides that, in Part C claims, miners who do not apply within three years of last exposure to coal dust cannot have the benefit of the presumption contained in § 411(c)(4).

tors will not even bear full financial responsibility for these claims, but only for any additional benefits payable under the Part C program.[25]

The number of claims awarded in the second category—miners whose claims were denied by Social Security—will be negligible for miners who retired before December 30, 1969. In no way are the Department of Labor's adjudicatory criteria more liberal than the Social Security criteria; as noted, in law and in practice the Department of Labor criteria are far more restrictive. Consequently, approval by the Department of Labor of any claim of a miner who retired before December 30, 1969, and who was denied by Social Security would be an administrative fluke.[26]

It follows that, if the operators become liable for any substantial number of claims of miners who left employment prior to December 30, 1969, the liability will be for miners who were unaware of their opportunity to apply for black lung benefits before July 1, 1973. If there was a flaw in the statutory scheme, it was not that Congress created operator liability for some small number of claims of miners who retired before the Act's passage, but rather that Congress failed to place upon the operators—who had sole knowledge of the identity of their former employees—the mandatory duty to notify all their former employees of the opportunity to apply for benefits under Part B of Title IV of the Act. It would have been far better for all concerned if the operators had recognized their own economic interest in paying the costs of mailing notices about the availability of federal black lung benefits to all their former employees before July 1, 1973, rather than investing instead in the costs of this litigation.

[25] A miner who establishes simultaneous entitlement to Part B and C benefits does not forfeit his Part B claim. Rather full Part B benefits continue. Since Part C benefits are offset by any Part B benefits received, under the provisions of § 422(g), the operator is liable only for any medical treatment for respiratory disease, and, in an occasional claim, for partial benefits due to the different offset provisions (see nn. 19 and 20, *supra*.

[26] The only exception would be the rare case where pneumoconiosis dramatically progressed after Social Security denied the claim. In such cases the miner's pneumoconiosis would ordinarily have to show up on an X-ray for the first time after June 30, 1973, and he would have to have as well a very sharp decline in pulmonary function test scores.

B. The operators' liability for the claims of certain former employees does not create any substantial economic hardship.

The operators contend that their liability for benefits to former employees places an arbitrary and irrational burden on them, but they have failed to demonstrate that the burden has any weight or substance. The posture in which this case has been litigated—divorced from any actual imposition of the liability about which the operators complain—lends itself to the hypothetical, even fictional, concerns that pervade the operators' briefs and pleadings.[27]

Over the entire industry the total number of claims awarded by the Department of Labor to miners who left coal mine work before December 30, 1969, cannot conceivably be more than a few thousand, and very probably

[27] A notable example is the affidavit of J. Huell Briscoe (App. 31-35), on which the operators rely as a statement of their liability under Part C. Mr. Briscoe comes up with the fantastic figure of $2,236,246,-588 as the amount of the coal industry's liability for medical benefits to former miners. He bases his estimate on a prediction that the average medical costs per claim will be $12,216. Perhaps Mr. Briscoe did not realize that medical benefits are payable only for conditions related to pneumoconiosis. Considering the number of other third-party payment sources available to disabled miners, it is impossible to imagine these miners charging to their black lung medical card an *average* medical bill of $12,216 for respiratory disease treatment alone between now and 1981, or even during their entire lifetimes. Furthermore, with no explanation or documentation, Mr. Briscoe estimates coal operator liability for 155,600 "former miners" (a term he does not define) by counting claims filed (rather than awarded) and by predicting operator liability for 130,600 Part B claimants. As demonstrated, there is no likelihood that more than 3,000 miners employed before December 1969 will be eligible for medical treatment benefits chargeable to the operator, that is, 1/50 of the claims estimated by Mr. Briscoe.

will be less.[28] There is no showing in the record of this case that any of the named plaintiffs except one has incurred or will incur liability for *any* claims of miners who retired before December 30, 1969. Nor is there a showing that any single coal operator will be liable for more than a few dozen such claims. The only specific mention of actual liability is a listing of 25 claims for which Peabody Coal Company—the nation's largest—has been initially determined to be liable.[29] Even those 25 claims do not represent final determinations, since they were awarded subject to Peabody's right to contest liability. If the largest coal company in the country lists only 25 cases of potential liability two years after the program has begun, it is most difficult to sympathize with the operators' assertion that a significant burden is involved.

Average monthly benefit payments to a miner or his survivor under the Part C black lung program are $268.04.[30] That amounts to about $3,200 annually. Even if Peabody or some other operator were assigned total liability for as many as 25 claims of miners who retired before December 30, 1969, its responsibility for payments over a one-year period would be $80,000.[31] That is a minimal amount compared with coal company budgets, compared with coal company liability for state workmen's compensation payments, and compared with coal company profits.

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[28] See Part IA, *supra*.

[29] Turner Elkhorn Brief 30 n.1.

[30] U.S. Dept. of Labor, Black Lung Benefits Act of 1972: First Annual Report on Administration of the Act during the Calendar Year 1974 and the Transitional Period in the Second Half of 1973, at 11 (May 1975).

[31] The operator would be liable for some additional amount of medical treatment benefits. There is not yet sufficient experience with the medical treatment program to make an accurate assessment of the liability it will create. The amount is not likely to be large, however, since most beneficiaries will have one or more third-party payment sources for these costs, and the benefits are limited to treatment for conditions arising from the miner's pneumoconiosis.

Plaintiffs allege in their complaint that their combined coal production is 134,300,000 tons per year.[32] Steam coal is currently priced on the open market at more than $15 per ton. At that rate, the sale of coal alone will net plaintiffs more than 2 billion, 14 million dollars annually.[33] For companies doing that volume of business it is highly doubtful that the claims of a few hundred miners could be a burden of any significance at all.

Moreover, compared to the total worker's compensation liability of coal companies, this liability imposes no additional substantial burden. The coal companies complain, and it is true, that they must pay high rates to insure against their state and federal compensation liability. Coal mining is the nation's most dangerous industry, and coal company compensation rates reflect that fact.[34] But the high rates do not result from their responsibility for federal black lung benefits. In fact, in Kentucky, where this action arose, there has been no increase whatever in the insurance rates for underground coal mines attributable to liability for federal black lung payments.[35] In other coal mining states the rates have been raised, but not signicantly.[36] If insurance

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[32] App. 18.

[33] Steam coal is the coal burned by utilities. This estimate is based on the most recent monthly report of the Federal Power Commission, which reported prices for April 1975. The estimate has been adjusted to represent the FOB mine price. Metallurgical coal is priced at more than $35 per ton. Federal Power Commission, Monthly Fuel Cost and Quality Information (Aug. 7, 1975).

[34] In West Virginia, for example, underground coal mines are classified A-1 and the base rate of payments to the West Virginia Workmen's Fund is the highest of any industry. See West Virginia Workmen's Compensation Fund, Annual Report for Year Ending June 30, 1974 (1975), Table 19.

[35] Statement of William Vieweg, Chief, Technical Service Branch, Division of Coal Mine Workers' Compensation, U.S. Dept. of Labor, Hearings on H.R. 3476, *supra*, n.12, at 326. See also *id.* (letter from Nancy Snyder, Associate Director, Division of Coal Mine Workers' Compensation, U.S. Dept. of Labor).

[36] Hearings on H.R. 3476, *supra*, n.12, at 325-26.

companies expected to incur any substantial additional costs on account of the federal black lung program, they would certainly adjust their rates to reflect it.

Finally, a look at the profits of some of the named plaintiffs indicates that this kind of liability is not about to put them out of business. The profits listed in note 37 are for 1974, the year when the operators became liable for Part C benefits and were required by law to have purchased insurance to cover that liability. They are compared with the operators' profits in 1973, when liability and the responsibility to purchase insurance coverage had not yet begun. It is indeed difficult to take seriously the claim of a company that it has been irrationally disadvantaged when it showed a 313 per cent increase in profits in a recession year.[37]

The operators have based their argument of irrationality upon the "philosophy underlying workmen's compensation laws"—the philosophy that the costs of occupationally-caused injury and disease should be reflected in the price of the product and passed on to the consumer.[38] Today, however, coal prices do not equal production costs plus a cut-throat margin of profit. Instead, they rise and fall in response to price changes in alternative energy sources, particularly oil.[39] Moreover, the margin of profit for the plaintiff coal companies is so large that the minor degree of liability imposed by the Act will have no impact at all on their competitive advantage and will not make a difference in the price of coal. Far from being irrational, an Act that compensates men who built the coal industry with some small part of the windfall profits the industry is now enjoying is both socially and economically rational.

[37] The UMWA Research Department, on the basis of company annual reports, SEC Form 10-K, and Moody's Investors Service, Industrial Manual (1975), prepared the following chart:

Company	1974 profits (in millions)	1973 profits (in millions)	% change in profits
Peabody	29.3	7.1	+ 313%
Old Ben	21.35	8.5	+ 155%
Carbon Fuel	14.3	2.4	+ 498%
Valley Camp	4.9	2.4	+ 104%

[38] Turner Elkhorn Brief 35.

[39] Mitre Corporation, *Analysis of Steam Coal Sales and Purchases* (prepared for the Federal Energy Administration Office of Coal) 9-18 (April 1975).

II. THE REBUTTABLE PRESUMPTIONS CONTAINED IN § 411(c) WERE AN APPROPRIATE AND NECESSARY LEGISLATIVE RESPONSE TO THE INADEQUACY OF RECORDS FROM THE PAST AND THE IMPERFECTNESS OF ALL KNOWN MEDICAL TECHNIQUES FOR POSITIVE DIAGNOSIS OF PNEUMOCONIOSIS DURING LIFE.

The wisdom of the presumptions enacted by Congress in §§ 411(c)(1), (c)(2), and (c)(4) of the Act is not, of course, an issue to be considered by this Court.[40] It is neither constitutionally required nor appropriate for this Court to become involved in the complex and highly controversial medical debate over the etiology and diagnosis of coal workers' pneumoconiosis. Nevertheless, the operators attempt to involve the Court in that debate and, in the course of their effort, raise so many spurious or medically discredited arguments that some setting straight of the record is in order.

All three of the presumptions go to the issue of causation. Section 411(c)(1) establishes a rebuttable presumption that the pneumoconiosis of a miner who worked 10 or more years in a coal mine was caused by his coal mine employ-

[40] The operators also attack the prohibition in § 413(b) against denying claims solely on the basis of a negative X-ray. The court below upheld that provision without discussion. The UMWA likewise feels that the attack is not substantial enough to require a reply. Furthermore, the discussion of the unreliability of X-ray evidence, *infra*, which demonstrates the rationality of § 411(c)(4), applies as well to § 413(b).

ment. Under § 411(c)(2), there is a rebuttable presumption that a miner who worked 10 or more years in a coal mine and died from a respirable disease, died from pneumoconiosis. And § 411(c)(4) creates a rebuttable presumption that a miner who worked 15 or more years in a coal mine and who is or was totally disabled by a respiratory impairment, is or was disabled by pneumoconiosis.

The operators piously argue that it would be more rational to base these presumptions upon total exposure to coal dust than upon years of coal mine employment.[41] Of course it would! But where does the fault lie for the unfortunate fact that this is impossible? There are no lifetime records of coal dust exposure for most miners because the coal mining industry did not keep such records. Just in the past three or four years have such records begun to be kept for the mining population as a whole, and only as a result of the very Act whose irrationality the operators now attack.[42] It is the very lack of exposure data—the miner or his survivors are utterly unable to locate objective proof of the miner's exposure to respirable dust—that makes the presumptions based on years of service necessary.

The first presumption amounts to little more than a tautology: If the miner proves that he is totally disabled by pneumoconiosis, a disease defined as being occupationally-caused,[43] the law will presume that his occupation caused his disease. No genuine shifting of the burden of proof occurs in connection with this presumption. Its only practical effect is to make it unnecessary for the miner to

[41] Turner Elkhorn Brief 56-57.

[42] Title II of the Act establishes requirements for the sampling, reporting, and monitoring of respirable dust levels. During the period of time that records have been kept, the presumption contained in § 411 (c)(4) does not apply. See § 430.

[43] The operators cite the following definition of pneumoconiosis from Stedman's Medical Dictionary 1264 (21st Ed. 1966): "A fibrous induration of the lungs due to the irritation caused by the inhalation of dust incident to various occupations . . . ." Turner Elkhorn Brief 46 n. 21.

come forward with proof that his employment outside the coal mines, if any, did not involve exposure to pneumoconiosis-causing dust.

In contrast, the other two presumptions do shift the burden of proof. The shifts were necessary to prevent the miner or miner's widow from being disadvantaged by the very failures of industry and medical science for which the Act was intended to correct.

In providing benefits for widows as well as for living miners, Congress had to deal with a situation where past medical records, like past exposure records, were woefully inadequate. Hence, the presumption of § 411(c)(2) represents the congressional attempt to prevent miners' widows from being incurably prejudiced in their claims because medical death records for their husbands no longer exist or because their husbands were not attended by physicians knowledgeable about pneumoconiosis. As Congressman Flood eloquently observed in an impassioned floor speech:

> "The opponents say let them prove they have black lung, or if they are dead, let their widows prove they died of black lung.
>
> "They demand: Where is the evidence? Where are the hospital records? Where are the X-rays, huh? 'OK, prove it and we pay it.'
>
> "Dear God.
>
> "You should have seen those hospitals or the things that went by the name of hospitals, and the doctors who were on the company payrolls going around with a horse and buggy. What records? What evidence? Those doctors did not keep records even of the feed they gave to their horses, let alone the kind of records demanded by social security, and the experts today of evidence of what we had in the hard coal fields then

> called miner's asthma, or hard coal asthma, better called black lung today in both the hard and soft coal fields."[44]

The presumption thus operates to benefit a widow primarily in situations where medical records are scanty, inconclusive, or nonexistent. If there are complete medical death records, the medical evidence will either establish that pneumoconiosis was a substantial cause of death or establish that it was not. In short, without the presumption of § 411(c)(2) the irrational factor of whether or not complete medical records exist would be decisive in many widows' claims.

Similarly, the presumption of § 411(c)(4) is a fair and rational congressional attempt to establish eligibility criteria that take into consideration the limitations of current diagnostic techniques.[45] There is at present no practical method for positively determining whether or not a living miner is suffering from pneumoconiosis. The lung biopsy can prove the existence of pneumoconiosis, but it cannot prove nonexistence, since pneumoconiotic changes may be clustered in a part of the lung other than the part sampled. Furthermore, lung biopsy is far too drastic a technique to be used merely to determine eligibility for benefits; responsible physicians use this technique only when it is medically indicated. That leaves the X-ray. But, as witness after witness told congressional committees, the X-ray falls far short of being an objective means for determining the existence of pneumoconiosis or its degrees of advancement. In hearings prior to the enactment of the 1969 law and again prior to the 1972 amendments, numerous distinguished medical authorities testified that, in many miners, they found little relationship between X-ray findings and the degree of ad-

[44] 118 Cong. Rec. 16581 (1972).

[45] Although the district court upheld the presumption, it struck down the third sentence of § 411(c)(4), which establishes a standard of proof for rebutting the presumption. As the government explains, the court's holding was based on a misunderstanding of the operation of that sentence.

vancement of occupationally-related lung disease.[46] Moreover, federally-sponsored studies have demonstrated that highly trained physicians regularly and substantially disagree about whether an X-ray demonstrates pneumoconiosis and, if so, how much.[47]

Before reporting out the bill that became the Black Lung Benefits Act of 1972, the Senate Committee on Labor and Public Welfare conducted six days of hearings on proposed black lung legislation. The Committee's report is its own best testament that Congress acted rationally and based its proposals on information provided by credible medical and lay witnesses. For this reason the report is quoted at length:

> "Although title IV of the 1969 Act is couched in terms of pneumoconiosis, it has become glaringly apparent that the Act is not benefiting many of the nation's disabled coal miners who Congress intended to benefit. Testimony has indicated that miners with disabling breathing impairments who cannot be diagnosed medically as suffering from pneumoconiosis be-

[46] Testimony of D. L. Rasmussen, M.D., Harvey A. Wells, M.D., Lorin E. Kerr, M.D., Werner A. Lagueur, Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 355, 91st Cong., 1st Sess., Pt. 2, 660, 664, 687, 693, 702. See also testimony of D. L. Rasmussen, M.D., Gordon Harper, M.D., Harry Lipscomb, M.D., John Rankin, M.D., Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 2675, 92d Cong., 1st Sess., 115, 138, 151, 165.

[47] R. B. Reger and W. K. C. Morgan, *On The Factors Influencing Consistency in the Radiologic Diagnosis of Pneumoconiosis,* 102 Amer. Rev. of Respiratory Disease 905 (1970). In this study, the physicians disagreed in nearly 50 per cent of the films as to how much pneumoconiosis, if any, was present. See also Felson, et al., *Observations on The Results of Multiple Readings of Chest Films in Coal Miners' Pneumoconiosis,* 109 Radiology 19 (Oct. 1973); Reger, et al., *On The Diagnosis of Coalworker's Pneumoconiosis: Anglo-American Disharmony,* 108 Amer. Rev. of Respiratory Disease 1186 (1973); and W. K. C. Morgan, et al., *The Prevalence of Coal Workers' Pneumoconiosis in U.S. Coal Mines,* 27 Archives of Environmental Health 221 (Oct. 1973).

cause of the state of the art, are being denied benefits though they are as severely and often times more severely impaired than miners whose claims have been granted.

"The reasons for these denials are many. The great majority of denials are attributed to the inability of the miner to present X-ray evidence of the disease. Some have been denied because the simple breathing test, which measures only ventilatory capacity, may not adequately detect disabling respiratory or pulmonary impairment. . . .

* * * *

"Congress recognized when the Act was being considered, however, that the chest X-ray, or roentgenogram, was an imperfect means of ascertaining the existence of pneumoconiosis in coal miners. Testimony to that effect was provided by the Surgeon General, who produced a Public Health Service study showing the existence of pneumoconiosis from autopsies performed on deceased coal miners who had, while living, been diagnosed by means of X-ray examination to be free of pneumoconiosis. For this reason the Senate Committee report on the 1969 Act specifically referred to the need to require medical tests other than the X-ray to 'establish the extent and severity of the disease.' Many cases have come to the Committee's attention in which a miner is suffering from a severely disabling respiratory or pulmonary impairment, and yet he has no X-ray evidence of pneumoconiosis.

"Because of the continuing recognition of the fact that X-ray evidence is not always satisfactory, the Committee retained a provision of the House bill which prohibits the denial of a claim solely on the basis of the results of a chest roentgenogram. It was anticipated by Congress in 1969 that other tests to establish pneumoconiosis would be developed through research.

This has not been done, and the Social Security Administration continues to rely exclusively on the results of X-ray evidence.

"Testimony has further indicated that a negative X-ray is not proof positive of the absence of pneumoconiosis. Studies in addition to that of the Public Health Service confirm the existence of the disease by autopsy where a chest X-ray was negative, indicating an error of 25 per cent in diagnosis.

"In addition, many believe that coal miners have a greater than average incidence of respiratory and pulmonary impairments other than pneumoconiosis. Considerable testimony was devoted to this premise. Even in 1969 the Surgeon General had stated that 'medical researchers in both Britain and the United States have repeatedly shown that coal miners suffer from more respiratory impairment and respiratory disability than does the general population.'

"Similarly, noted pulmonary experts Drs. William S. Lainhart and Keith G. Morgan have stated that 'it is fairly well accepted that coal miners have a higher prevalence of lung disease than does the general male population,' and that 'Several respiratory diseases occur more frequently in miners.'

"Other testimony indicates that an X-ray may often be clouded by the presence of emphysema so that pneumoconiosis does not show on the X-ray. In some cases it has been alleged that the X-ray was of poor quality, and for that reason did not show the existence of black lung.

"Senator Robert C. Byrd, in testimony before the Subcommittee on Labor on the pending black lung benefits legislation, spoke eloquently of this urgent problem. He said:

'Let us stop quibbling with dying men as to whether their lungs are riddled with black lung or whether they are affected with asthma, or silicosis, or chronic bronchitis.'

"An acknowledged expert in the field of pulmonary impairments of coal workers, Dr. Donald Rasmussen, Director of the Cardio-Pulmonary Laboratory at the Appalachian Regional Hospital, Beckley, West Virginia testified as follows:

'The . . . assumption that coal workers' pneumoconiosis per se is the only disease process related to coal mining is not medically justified. Other conditions of the lung, in addition to pneumoconiosis, are commonly encountered among coal miners.

'While the exact causes of these conditions are not completely understood and while other non-occupational factors may be in part responsible, no medical authority can prove these conditions to be unassociated with the mining exposure.

'Current medical concepts include viewing the lung diseases associated with coal mining as a broad spectrum of disease conditions. Often these conditions coexist with either coal workers' pneumoconiosis or silicosis. Some are in reality, sequelae to pneumoconiosis per se.'

* * * *

"Representatives of the Department of Health, Education and Welfare who testified before the Committee this year asserted that there is no medical evidence to verify that coal miners as a class suffer from a greater incidence of respiratory or pulmonary impairment, other than pneumoconiosis, than the rest of the male population. However, they also testified that there is no medical evidence to rebut the previously

quoted testimony. That there is this apparent difference of view is unfortunate. For the miner and his survivors it is calamitous.

"For at least the past decade Congress has appropriated funds specifically for research into the diseases of coal miners. And yet, the Executive Branch of government does not have the answers.

"The Black Lung Benefits Act of 1972 is intended to be a remedial law—to improve upon the 1969 provisions so that the cases which should be compensated, will be compensated. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.

"The Committee bill gives the benefit of the doubt to claimants by prohibiting denial of a claim solely on the basis of an X-ray, but providing a presumption of pneumoconiosis for miners with respiratory or pulmonary disability where they have worked 15 years or more in a coal mine, and by requiring the Social Security Administration to use tests other than the X-ray to establish the basis for a judgment that a miner is or is not totally disabled due to pneumoconiosis.

* * * *

"Sixty-two per cent of the denial of benefits issued by Social Security are based upon the claimant's failure to demonstrate the presence of coal workers' pneumoconiosis by X-ray evidence. In fact, there is strong evidence that emphysema may cloud an X-ray to such an extent that the X-ray shows no concentrations of coal dust, and is therefore read as negative. All medical witnesses before the Committee, save those of the Administration, urged less reliance on the X-ray.

"The publication 'Pneumoconiosis and Allied Occupational Chest Diseases,' issued by the British Ministry of Social Security, states that '. . . the disease (pneumoconiosis) is difficult to diagnose, especially in

the early stages, and accurate diagnosis depends on three essentials—a high quality full-size radiograph of the chest, a full clinical examination (including lung function tests) and complete industrial history.'

"Dr. Donald Rasmussen, a witness previously cited in this report, said this about sole reliance on the X-ray:

> 'No one is advocating that the X-ray not be employed, because the X-ray is a vital part of every medical evaluation, but the idea it can be used as a means of determining the presence of occupational lung disease is not tenable under the present state of knowledge, not only because all of the conditions which affect the miner may not be shown on the X-ray, the technical requirements of the X-ray are really too great, and the X-ray too unreliable, even for the purpose of detecting one entity, pneumoconiosis.'

"The bill reported to the Senate, H. R. 9212 as amended, establishes a rebuttable presumption that a totally disabled coal miner who worked in an underground mine for 15 years or a surface miner who was employed under environmental conditions similar to those experienced by underground miners, is totally disabled by pneumoconiosis if he has a totally disabling respiratory or pulmonary impairment, even if he has an X-ray which cannot be interpreted as positive for complicated pneumoconiosis. The Secretary of Health, Education and Welfare may rebut the presumption if (1) he establishes that the miner does not, or did not, have pneumoconiosis, or (2) that the miner's disability did not arise out of, or in connection with, his work in a coal mine. Lay evidence alone will not be sufficient to raise the presumption of pneumoconiosis.

* * * *

"The fifteen year period is not intended to be an inflexible standard serving as a bar to successful claims.

It merely reflects the testimony of the Surgeon General in 1969, who stated:

> 'For work periods less than 15 years underground, the occurrence of pneumoconiosis among miners appears to be spotty and showed no particular trend. For work periods greater than 15 years underground, there was a linear increase in the prevalance of the disease with years spent underground.' "[48]

III. SECTION 411(c)(3) IS A RATIONAL PROVISION, WHICH DOES NOT IN ANY WAY VIOLATE THE OPERATORS' RIGHT TO DUE PROCESS.

The government persuasively argues that Congress did not create a genuine presumption in § 411(c)(3), but rather used the phrase "irrebuttable presumption" as a form of legislative shorthand to accomplish the fully constitutional purpose of awarding benefits to all miners who suffer from the complicated stage of pneumoconiosis. The UMWA is in full accord with that analysis of the statute. Even assuming, however, that the district court could properly treat § 411(c)(3) as containing an irrebuttable presumption, the court erroneously held that provision unconstitutional.

A. Complicated pneumoconiosis is a devastating disease.

Complicated pneumoconiosis is an advanced form of coal workers' pneumoconiosis. It is identified during life by opacities on an X-ray of a miner's lung that are larger than one centimeter in diameter. After death it is diagnosed by autopsy when a pathologist finds massive lesions in the lung caused by the accumulation of coal dust. In general, the complicated stage of pneumoconiosis develops only after a

[48] H.R. Rep. No. 92-743, 92d Cong., 2d Sess., 843.

miner suffering from simple pneumoconiosis has had additional exposure to coal dust.[49]

Before enacting the Coal Mine Health and Safety Act, Congress heard testimony that medical opinion was substantially unified on the following matters:

1. Complicated pneumoconiosis afflicts only a small proportion of coal miners.

2. Complicated pneumoconiosis normally results in the total inability of a miner to engage in coal mine work.

3. Complicated pneumoconiosis is ordinarily progressive. It continues to get worse even if the miner has no further exposure to coal dust, although further exposure will hasten progression of the disease.

4. Miners who suffer from complicated pneumoconiosis have a significantly shorter life expectancy than other miners as a result of their lung disease.[50]

Medical opinion continues to be substantially unified on these matters.[51]

Based on this medical information, Congress enacted § 411 (c)(3), which provides that when X-ray, autopsy, biopsy, or other medical evidence demonstrates that a miner is or was suffering from complicated pneumoconiosis, "there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis." In practical effect this provision means that a miner with X-ray, autopsy, or biopsy

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[49] Statements of Werner A. Laqueur, M.D., Paul Gross, M.D., Ira Higgins, M.D., Leon Cander, M.D., Hearings on S. 355 *supra*, n. 46, Pt. 2, 695, 696, 760, 836-37, 857.

[50] Statements of Eugene A. Creany, Esq., Werner A. Laqueur, M.D., Wm. A. Stewart, M.D., Paul Gross, M.D., Ira Higgins, M.D., Leon Cander, M.D., Jethro Gough, M.D., Hearings on S. 355, *supra*, n. 46, Pt. 1, 502, Pt. 2, 696, 720, 759-60, 840, 843-44, 846, 855, 857-58, Pt. 3, 1029.

[51] *E.g.*, Morgan, *Respiratory Disease in Coal Miners*, 231 Journal of the American Medical Assn., at 1347 (March 31, 1975).

evidence of complicated pneumoconiosis may, without additional evidence, establish his eligibility for federal black lung benefits.

B. The district court misinterpreted § 402(f).

In holding that § 411(c)(3) is a constitutionally invalid irrebuttable presumption, the district court gave an unwarrantably restrictive meaning to the work-test definition of "total disability" contained in § 402(f). By erroneously reading that section to mean that *only* miners prevented by pneumoconiosis from engaging in gainful employment should be considered totally disabled, the court was able to conclude that § 411(c)(3) improperly departed from the statutory definition of disability.

The district court's restrictive construction of § 402(f) ignores the legislative history and the context in which the work-test language was added to the Act. Section 411(c)(3), providing benefits to all miners who suffer from complicated pneumoconiosis, was part of the Act as originally passed in 1969. Lengthy hearings were held in 1971 and 1972 because of increasing dissatisfaction in the coalfields with the Social Security Administration's restrictive implementation of the program. At those hearings attention focused on the unduly narrow regulations and rules of thumb adopted by Social Security to determine whether a miner was totally disabled by pneumoconiosis. There were no complaints about the implementation of § 411(c)(3). No one testified that miners suffering from complicated pneumoconiosis ought not to qualify for benefits. Rather, the dissatisfaction was with Social Security's mechanical disability criteria requiring X-ray proof of pneumoconiosis in all cases and adopting the definition of "total disability" contained in § 223(d) of the Social Security Act.[52] Congressman Burton

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[52] Section 223(d), 42 U.S.C. § 423(d), defines "disability" as "inability to engage in any substantial gainful activity."

forcefully expressed that dissatisfaction during the 1971 House Hearings:

> "One final point that occurs to me because it is also important. I think there is some misunderstanding at the executive level of the Social Security Administration. It is obviously very possible for a person to be totally disabled and still working. I am reminded of a woman who could do little more than move her chin about a quarter of an inch, a paraplegic, who was disabled but ineligible for benefits under our state public assistance laws because she was a telephone operator. So the finding of disability is not precluded by the mere fact that you happen, by some inordinate dint of effort or will, to be putting in a substantially full work week. . . . We did not view the fact that you were working as any evidence, per se, that you didn't come within the total disability parameters. It is a subtlety, but it is really quite important."[53]

Senator Randolph, who chaired the 1971 and 1972 Senate hearings, developed these thoughts in his opening statement:

> "H.R. 9212 is a worthy measure which makes significant changes in the black lung program. . . .
>
> "I do not believe, however, that it will alleviate the most critical problems faced by our disabled miners and survivors of deceased miners. . . . The House bill does not reach the large group of miners who suffer from pulmonary or respiratory impairments which, though not diagnosed as complicated pneumoconiosis are equally, if not more, disabling. The inclusion of pulmonary or respiratory impairments in my bill is an effort to establish a system under which these persons can receive fair and equitable consideration.

[53] Hearings before the House Committee on Education and Labor, on H.R. 9212, 92d Cong., 1st Sess., 107.

> "Coupled with this provision in my bill is a broader definition of disability. . . . The expanded definition of disability, in my opinion, will be essential if any substantial improvements to the black lung program are to be realized.
>
> "The point has been made time and again that a coal miner should be considered totally disabled when he can no longer work in the coal mines. Support of this proposition—and we will hear extensive testimony on this—rests in the uniqueness of employment circumstances in coal mining areas, the unavailability of other employment, and the lack of training for miners to pursue other gainful employment."[54]

The report of the Senate Committee on Labor and Public Welfare, which added the language of § 402(f) to H.R. 9212, makes clear that the committee's intent was to broaden the existing interpretation of "total disability" and not to narrow it in any way.[55]

Had the district court heeded the context in which § 402(f) was enacted, it would have realized that the amendment was intended to require the Social Security Administration to adopt regulations in addition to the already existing medical criteria in order to assure that miners who were in fact prevented by pneumoconiosis from performing coal mine work would be among those eligible for benefits. In failing to adopt this interpretation the district court ignored the legislative history as well as its obligation to resolve doubts about a statute's interpretation in favor of constitutionality.

Furthermore, in holding that § 411(c)(3) is a departure from the definition of total disability contained in § 402(f), the district court also gave an unduly restrictive definition to the word "prevents." In effect the court held § 411(c)(3) unconstitutional because it forecloses inquiry into

[54] Hearings on S. 2675, *supra*, n. 46, at 3.
[55] S. Rep. No. 92-743, 92d Cong., 2d Sess., 16-17.

whether a miner with complicated pneumoconiosis is actually prevented from performing his usual coal mine work.

A layman's acquaintance with modern medical concepts is enough to know that the word "prevent" in this context is subject to variable interpretation, depending upon a variety of economic, social, psychological, and medical factors. For example, if "prevent" means merely that the miner lacks physical energy or muscular capacity to turn on and run the levers of a cutting machine or a shuttle car, then most heart attack victims and most tuberculosis patients would not be "prevented" from doing coal mine work. But they would undoubtedly be "prevented" by the plaintiff coal operators as well as their physicians from performing coal mine work —not because they could not make it through a shift but because the likelihood that they would seriously aggravate their condition is so high that their work activity would pose a danger to themselves and to their fellow employees. Similarly, a person who breathes abnormal amounts of carbon monoxide is able to keep on breathing it even after he gets sick—until he dies from it. A miner suffering from complicated pneumoconiosis may be able to continue performing his job in the coal mines and to continue breathing coal dust—but if he does, he will die from it.

Preventive health is just what it says in this context. One of the primary remedial purposes of Title IV of the Act was to apply modern medical understanding of the cause of coal workers' pneumoconiosis to make it unnecessary for miners to work themselves to the point of utter helplessness and death. A miner with complicated pneumoconiosis would be *prevented* by virtually any knowledgeable physician from performing his usual coal mine work—not necessarily because he could not meet his work quota, but because additional exposure to coal dust is so likely to kill him. Even without continued exposure, his lung disease is likely to progress and to cause premature death. But it is medically incontestable that continued exposure to coal dust will hasten

the process and make his condition all the more certainly deadly. Consequently, it is entirely rational and consistent with the purposes of the Act to provide benefits to any miner suffering from complicated pneumoconiosis.[56]

C. Judged by the guidelines set forth in *Salfi* v. *Weinberger*, § 411(c)(3) is clearly not an unconstitutional presumption.

The district court based its holding that § 411(c)(3) is an unconstitutional irrebuttable presumption on the prior decisions of this Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1973), and *Vlandis* v. *Kline*, 412 U.S. 441 (1973).[57] Subsequent to the district court's ruling and subsequent to the noting of probable jurisdiction in this case, this Court explained and limited its previous decisions on irrebuttable presumptions in *Salfi* v. *Weinberger*, —— U.S. ——, 43 U.S.L.W. 4985 (1975).

Salfi is a clear departure from the Court's previous recent decisions on irrebuttable presumptions.[58] It lays the substan-

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[56] There is no inconsistency in the circumstance that a miner who suffers from complicated pneumoconiosis can qualify for benefits while still employed in the mines. That is not *per se* an encouragement to continue working, but rather a means for the miner to stop working. Under the present system, with delays of one to two years in the processing of claims and a 78.4 per cent denial rate, many miners now feel they cannot afford first to stop work and later to find out whether they are eligible for benefits. A miner who is already assured of his entitlement to benefits is far more likely to heed medical advice that he leave the mines.

[57] The court also cited a discredited economic due process case from the 1930's, *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

[58] While not explicitly an "irrebuttable presumption" case, *Marshall* v. *United States*, 414 U.S. 417 (1974), prefigured the *Salfi* decision. In *Marshall*, the Court upheld against due process attack a provision of the Narcotic Addict Rehabilitation Act of 1966 that excluded all persons with two or more convictions from the opportunity for civil commitment. The Court said, "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices." *Id.* at 427.

tive due process doctrine back in its historical resting place and reaffirms the "rational relationship" test as appropriate for evaluating congressional enactments in the area of social welfare legislation. It returns to the standard of *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960), that "the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Salfi* also refers to *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971), where the Court said that a congressional enactment does not violate the Due Process "[i]f the goals sought are legitimate, and the classification is rationally related to the achievement of those goals . . . ."

Judged by the criteria set forth in *Salfi*, the irrebuttable presumption in § 411(c)(3) is unquestionably constitutional. There is a sound rational basis for the classification.[59] The classification involves no invidious discrimination. It does not prejudice any fundamental right of the coal operators.[60] That coal operators rather than the federal government must pay the benefits is no ground for applying a different constitutional standard.[61] Nor is a different standard

[59] Namely, that Congress heard testimony and was aware of widely held medical opinion that complicated pneumoconiosis is an advanced stage of pneumoconiosis that usually leads to disability and premature death. See Part III A, *supra*.

[60] In *Salfi* the Court distinguished *Stanley* v. *Illinois*, 405 U.S. 645 (1973), and *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974), by classifying the rights at stake (the rights to conceive and bear one's children and the right to personal choice in matters of marriage and family life) as fundamental rights entitled to special constitutional protection. By contrast, said the Court, "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status . . . ." *Salfi*, 43 U.S.L.W. at 4992.

[61] In *Salfi*, 43 U.S.L.W. at 4992, the Court referred to the long line of cases holding that the Fifth and Fourteenth Amendments require no closer judicial scrutiny of laws and regulations affecting private business than that necessary to assure that there is a rational relationship to the underlying policy objectives and no invidious discrimination. See also *Marshall* v. *United States*, 414 U.S. 417, 433 (1974) (Marshall, J., dissenting).

called for because the potential payor rather than the payee has attacked the classification.

No prior decision of this Court suggests that there is any constitutional reason why Congress cannot require a coal operator to pay compensation benefits to a miner whose health has been impaired to the extent of developing complicated pneumoconiosis as the result of his coal mine employment. *Salfi* plainly mandates that Congress can do so. Section 411(c)(3) is a rational and humane provision, which this Court should restore to full operation at an early date.

CONCLUSION

For the foregoing reasons, the judgment of the district court on appeal in No. 74-1316 should be affirmed, and the judgment of the district court on appeal in No. 74-1302 should be reversed.

Respectfully submitted,

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September 1975